Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

SOUTHEASTERN MARITIME COMPANY and GEORGIA INSURERS INSOLVENCY POOL,

Petitioners,

v.

ALONZO BROWN and DIRECTOR, OFFICE OF WORKERS' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED FOR REVIEW

Whether annual adjustments under § 10(f) of the Longshore and Harbor Worker's Compensation Act accrue from the date of injury, and not from the date the claimant is found to be permanently, totally disabled.

PARTIES TO PROCEEDING

The case caption contains the names of all parties to the proceeding.

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CITATIONS TO OPINIONS AND ORDERS BELOW

On January 19, 1994, Administrative Law Judge Aaron Silverman issued a Decision and Order wherein he found Claimant to be entitled to permanent, total disability from January 29, 1987. The opinion of the Administrative Law Judge is attached hereto as Appendix C. On August 17, 1994, Administrative Law Judge G. Marvin Bober issued a Decision and Order on Motion for Reconsideration denying Employer/Carrier's request that annual adjustments under Section 10(f) accrue from the date the Claimant is found to be permanently, totally disabled, and not from the date of the injury. The Decision and Order on Motion for Reconsideration is attached hereto as Appendix D. On September 12, 1996, the Benefits Review Board issued an Order affirming the decision of Administrative Law Judge Bober. The Decision and Order of the Benefits Review Board is attached hereto as Appendix E. On September 10, 1997, the Eleventh Circuit Court of Appeals denied Employer/Carrier's Petition for Review of the decision of the Benefits Review Board on the grounds that a Suggestion for Rehearing *En Banc* was required. The opinion of the Eleventh Circuit is attached hereto as Appendix A. On November 26, 1997 the Eleventh Circuit Court of Appeals denied Employer/Carrier's Suggestion for Rehearing *En Banc*. The Eleventh Circuit's Order is attached hereto as Exhibit B.

STATEMENT OF BASIS FOR JURISDICTION

The Order sought to be reviewed was entered by the Eleventh Circuit on September 10, 1997. The Order

entered by the Eleventh Circuit denying Petitioner's Suggestion for Rehearing *En Banc* was entered on November 26, 1997. This Court has jurisdiction over appeals from Orders of the United States Courts of Appeals pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED IN THE CASE

"Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on October 1, as determined under section 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,

(2) 5 per centum." *33 U.S.C.§ 910(f).*

STATEMENT OF THE CASE

Introduction

The issue in this case is whether or not the Eleventh Circuit Court of Appeals erred in its affirmation of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981) (holding that § 10(f) of the Longshore and Harbor Workers' Compensation Act requires that the Claimant receive annual adjustments beginning from the date of injury rather than the date the claimant is found to be

permanently, totally disabled) in light of the fact that the *Holliday* decision has subsequently been reversed by the Fifth Circuit and rejected by the Second and Ninth Circuits on the grounds that *Holliday* ignores the plain meaning of § 10(f).

Statement of Facts

1. Claimant was injured on August 14, 1983, when a spreader bar and large block and tackle fell on his head and shoulder and knocked him down. He suffered a laceration over his left eye; experienced pain in his neck and lower back; and subsequently experienced residual psychological problems. (See Appendix C, pp. App.5-6).

2. Pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, this matter came before a United States Department of Labor Administrative Law Judge for determination of whether or not Claimant was entitled to permanent total disability. (See Appendix C, p. App.5).

3. On or about January 19, 1994, the Honorable Aaron Silverman issued a Decision and Order wherein he found Claimant to be entitled to permanent total disability from January 29, 1987. (See Appendix C, pp. App.7-8).

4. On or about February 14, 1994, Carrier filed a Motion for Reconsideration asserting that the Decision should be clarified to provide that annual adjustments under Section 10(f) accrue from the date the Claimant is found to be permanently, totally disabled, and not from the date of the injury.

5. On or about August 17, 1994, the Honorable G. Marvin Bober issued a Decision and Order on Motion for Reconsideration in which he acknowledged that *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), which provided that all Section 10(f) cost of living adjustments accrue from the date of injury, had been overruled by the 5th Circuit in *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) on the grounds that under the plain meaning of § 10(f) only the cost of living adjustments provided were for permanent total disability. However, pursuant to *Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981), Judge Bober found that since *Phillips* was not decided until after the 11th Circuit broke from the 5th Circuit, *Holliday* is still binding precedent in the 11th Circuit. (See Appendix D, pp. App.10-15).

6. On or about September 13, 1994, Employer appealed the decision of Administrative Law Judge Bober to the Benefits Review Board.

7. On or about September 12, 1996, the Benefits Review Board affirmed the decision of Administrative Law Judge Bober. (See Appendix E, pp. App.16-17).

8. On or about October 28, 1996, Employer timely filed a Petition with the Eleventh Circuit Court of Appeals for Review of the Order of the Benefits Review Board.

9. On or about September 10, 1997, the Eleventh Circuit Court of Appeals denied Employer's Petition stating, in part "Notwithstanding petitioner's arguments regarding the wisdom of *Holliday* or the singularity of its

holding relative to other circuits, it is still binding precedent in our circuit" until such time as there is *En Banc* consideration. (See Appendix A, pp. App.1-2).

10. On or about November 26, 1997, Employer timely filed a Suggestion for Rehearing *En Banc*.

11. On or about November 26, 1997, the Court of Appeals denied Employer's Suggestion for Rehearing *En Banc*. (See Appendix B, pp. App.3-4).

Reasons for Granting the Writ

The Eleventh Circuit's affirmation of *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), a decision reversed by the Fifth Circuit and rejected by Second and Ninth Circuits, has subverted the plain meaning of § 10(f) of the Longshore and Harborworkers' Compensation Act and placed the Eleventh Circuit at odds with her sister circuits.

Section 10(f) of the Longshore and Harborworkers' Compensation Act provides:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national weekly wage, as so determined, for the period beginning with the preceding October 1; or,

(2) 5 per centum.

In *Holliday v. Todd Shipyards*, 654 F.2d 415 (5th Cir. 1981), prior to the split between the Fifth Circuit and the Eleventh Circuit, the Fifth Circuit approved, without analysis, an agreement between the parties whereby the claimant's permanent total disability adjustment rate would include all intervening § 10(f) adjustments occurring during the period of his temporary total disability.

In 1981, after the *Holliday* decision was issued, the Eleventh Circuit split from the Fifth Circuit and held that "the decisions of the United States Court of Appeals for the Fifth Circuit (the 'former Fifth' or the 'old Fifth'), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court. . . . " *Bonner v. City of Pritchard*, 661 F.2d 1206 (1981). Thus, *Holliday* became binding precedent in the Eleventh Circuit.

Subsequently, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990), the 5th Circuit reversed the *Holliday* decision. In support of their decision to overturn *Holliday*, the 5th Circuit first looked to the plain meaning of section 10(f) and stated, "In section 10(f), those words are plain and unambiguous: The only adjustments provided by the section are increases to 'benefits payable for *permanent* total disability' (emphasis added). There is no hint of a 'catch-up' clause that would provide that the first adjustment occurring during *permanent* total disability shall be larger than subsequent years' adjustments in order to make up for adjustments not made during the years of *temporary* total disability.

Thus . . . 'the intervening percentage increases' method of calculation adopted by *Holliday* finds no warrant in the statutory text." *Phillips*, at 1035.

The Fifth Circuit went on to state in *Phillips*, "Where the statute is so lucid, we need not look to the legislative history for further guidance." *Phillips*, at 1032. However, in a footnote, the Fifth Circuit quotes House and Senate Reports indicating that section 10(f) is intended " 'to provi[de] for upgrading benefits in *future* years for cases of *permanent* total disability or death benefits.' " *Phillips*, at 1032 *citing* H.R.Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972). S.Rep. No. 92-1125, 92d Cong., 2d Sess. 6 (1972), *reprinted in* 1972 U.S.Code Cong. & Admin.News 4700.

The Court of Appeals for the Second Circuit adopted the rule of law as set forth in *Phillips* and rejected the position taken in *Holliday* on the grounds that *Holliday* conflicts with both the Board's and OWCP's interpretations of section 10(f). *Lozada v. Director, OWCP, U.S. Department of Labor et al.*, 903 F.2d 168 (1990).

Similarly, the Court of Appeals for the Ninth Circuit looked to the plain language of section 10(f) in its rejection of *Holliday* stating, "There is nothing in § 10(f) to suggest that Congress intended claimants who are permanently totally disabled to receive the benefit of intervening cost-of-living adjustments occurring during a prior period of temporary disability. . . . Had Congress intended § 10(f) to be interpreted as [Claimant] proposes, it could have included a 'catch-up' clause as it did in § 10(h) of the LHWCA, 33 U.S.C. § 910(h), which was passed at the same time as § 10(f). Section 10(h) provides

an explicit mechanism for increasing the level of compensation for claimants whose injuries result in total permanent disability or death prior to October 27, 1972 so that the award approximates the level of compensation awarded employees injured after that date. Thus, Congress knew how to draft a provision to account for inflation during periods of stable compensation, but did not include such a provision in § 10(f)." *Bowen v. Director, Office of Workers Compensation Programs et al.*, 912 F.2d 348, (9th Cir. 1990).

In the case at bar, Claimant was injured on August 14, 1984 and on January 19, 1994 was adjudged permanently and totally disabled by Administrative Law Judge Aaron Silverman. On August 17, 1994, upon a Motion for Reconsideration, Judge G. Marvin Bober, relying upon *Holliday* and rejecting *Lozada*, held that annual adjustments under § 10(f) of the Act, 33 U.S.C.A. § 910(f), accrue from the date of injury and not the date the claimant is found to be permanently, totally disabled. This decision has been affirmed by the Benefits Review Board and the Eleventh Circuit Court of Appeals.

However, Carrier submits that *Phillips*, *Bowen*, and *Lozada* were correctly decided and should be followed. As the Fifth, Second and Ninth Circuits have illustrated, the language in § 10(f) is plain and unambiguous and it is undisputed that § 10(f) as written applies only to periods of permanent total disability. Thus, the Eleventh Circuit's affirmation of *Holliday* has subverted the plain meaning of § 10(f) and placed the Eleventh Circuit at odds with her sister circuits.

A famous Georgia jurist, Justice Logan E. Bleckley, stated that a "precedent which has no characteristic but that of being a physical fact, is of very little consequence." *Kaufman v. Ferst & Co.*, 55 Ga. 350, 353 (1875). Since the *Holliday* decision has been overruled by the very court that issued it, it has no characteristic but that of being a physical fact and should not be upheld.

CONCLUSION

For the foregoing reasons, Employer respectfully requests that its Petition for Writ of Certiorari be granted and that the decision of the Eleventh Circuit be reversed.

Respectfully submitted,

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APPENDIX A

**SOUTHEASTERN MARITIME COMPANY,
Georgia Insurers Insolvency Pool, Petitioners,**

v.

Alonzo BROWN and Director, Office of Workers' Compensation, United States Department of Labor, Respondents.

**No. 96-9287
Non-Argument Calendar.**

United States Court of Appeals,
Eleventh Circuit.

Sept. 10, 1997.

Petition for Review of an Order of the Department of Labor Benefits Review Board.

Before TJOFLAT, COX and BIRCH, Circuit Judges.

PER CURIAM:

Southern Maritime Company and Georgia Insurers Insolvency Pool (collectively "petitioners") appeal the decision of the Benefits Review Board pursuant to 33 U.S.C. § 921(c). That decision affirmed the Administrative Law Judge's determination that Alonzo Brown, who had been injured in a work-related accident, was entitled to permanent total disability, with annual adjustments to accrue from the date of temporary total disability.

Petitioners acknowledge that this case is controlled by precedent set forth by our predecessor circuit in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A 1981), which held that, under section 10 of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C.

§ 910(f), a claimant's permanent total disability adjustment rate would include all intervening adjustments that occur during the period of his temporary total disability. Petitioners, however, point to the fact that the current Fifth Circuit has overruled *Holliday, see Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir.1990), and that this position also has been adopted by both the Second and Ninth Circuits. *See Lozada v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 903 F.2d 168 (1990) and *Bowen v. Director, Office of Workers Compensation Programs*, 912 F.2d 348 (9th Cir. 1990). Petitioners urge us to abandon *Holliday* in favor of the approaches taken by these other courts and hold that section 10(f) adjustments apply only to the period of a claimant's permanent total disability.

Our holding in *Holliday*, however, has been reaffirmed by the Eleventh Circuit subsequent to the circuit split. *See Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor v. Hamilton*, 890 F.2d 1143 (11th Cir.1989) ("[W]e must affirm the decision of the Benefits Review Board unless this court, sitting en banc, overrules *Holliday*.") Notwithstanding petitioners' arguments regarding the wisdom of *Holliday* or the singularity of its holding relative to the other circuits, it is still binding precedent in our circuit. As noted in *Hamilton*, barring *en banc* reconsideration of *Holliday*, the reasoning and holding announced in that case remains the law. Accordingly, the decision of the Benefits Review Board is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-9287

SOUTHEASTERN MARITIME COMPANY,
GEORGIA INSURERS INSOLVENCY POOL,

Petitioners,

versus

ALONZO BROWN and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Appeal from the United States District Court for the Southern District of Georgia

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(Filed Nov. 26, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____ F.2d _____).

Before: TJOFLAT, COX and BIRCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

APPENDIX C

[SEAL]

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of: ALONZO BROWN, Claimant, v. SOUTHEASTERN MARITIME CO., Employer, and GEORGIA INSURERS INSOLVENCY POOL Statutory Obligor,	DATE: JAN 19 1994 CASE NO: 84-LHC-3178 OWCP NO: 6-77155

Paul H. Felser, Esq.
For the Claimant

Edward T. Brennan, Esq.
Richard C.E. Jennings, Esq.
For the Employer

Before: AARON SILVERMAN
Administrative Law Judge

DECISION AND ORDER – AWARD OF BENEFITS

Proceeding under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (Act).

ISSUE

Nature and Extent of Disability

Statement of the Case

The Claimant seeks compensation for permanent total disability beginning January 27, 1987. Although the Employer has paid compensation for temporary total disability, it contends that the Claimant is malingering and not disabled.

The Claimant was injured August 14, 1983, when a spreader bar and large block and tackle fell on his head and shoulder and knocked him down. He suffered a laceration over his left eye and experienced pain in his neck and lower back. Subsequently he developed a psychological disorder diagnosed by Dr. Henry Brandt, his attending psychiatrist, as a post-traumatic reaction with severe somatication and conversion reaction process.

By decision and order of August 18, 1986, the Claimant was awarded benefits for temporary total disability because of his psychiatric and psychological problems.

FINDINGS AND CONCLUSIONS

Permanent disability, as interpreted in case law, is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration. A Claimant is permanently disabled if disability exists after

maximum medical improvement is reached. Permanent does not mean unchanging.

The Claimant is still under Dr. Brandt's care. The Employer bases its defense of malingering on the conclusion reached by Dr. Erwin R. Smarr, a psychiatrist, who is the medical director of the Department of Psychiatry of the Memorial Medical Center and so testified at a third-party jury trial in October 1988.

A second hearing was conducted in this matter March 10, 1993. In connection with it, Dr. Brandt was deposed March 4, and Dr. Smarr was deposed March 8. Dr. Smarr had changed his opinion. In unequivocal terms, each doctor has now concluded that the Claimant cannot return to his longhsore [sic] or other employment, and is permanently and totally disabled by his psychiatric and psychological problems arising from his work-related accident on August 14, 1983. Except for Dr. Smarr's earlier opinion, there is no evidence to the contrary.

Dr. Brandt provided a physician's statement for a pension committee dated January 29, 1987, in which he concluded that the Claimant was totally and permanently disabled. In the absence of other definitive information, that date is accepted as the date of maximum medical improvement from which permanency ensues.

ORDER

The Employer shall:

1. Pay to the Claimant compensation for all temporary total disability and beginning January 29, 1987 for permanent total disability at the rate and in a manner

consistent with applicable statutory and regulatory provisions beginning.

2. Pay and reimburse the Claimant for all medical costs incurred as a result of his employment-related injuries.

3. Pay all interest and penalties, if any, that may be required by applicable statutory and regulatory provisions.

/s/ Aaron Silverman
AARON SILVERMAN
Administrative Law Judge

CERTIFICATE OF FILING AND SERVICE

I certify that on February 4, 1994 the foregoing Compensation Order was filed in the Office of the District Director, Sixth Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Alonzo Brown, 1830 Champion St., Savannah, GA 31405
Claimant

Attorney Paul H. Felser, P. O. Box 9087, Savannah, GA 31412
Claimant's Attorney

Georgia Insurers Insolvency Pool, 2799 Lawrenceville Hwy., Suite 200, Decatur, GA 30033

Insurance Carrier/Employer (if self insured)
**(if applicable)

Attorney Edward Brennan, P. O. Box 2784, Savannah, GA 31402
Insurance Carrier's Attorney

A copy was also mailed by regular mail to the following:

Judge Aaron Silverman, Office of Administrative Law Judges, U. S. Department of Labor, 800 K Street, N. W., Washington, DC 20001-8002

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, 200 Constitution Ave., N. W., Suite S-4325, NDOL, Washington, DC 20210

/s/ N. Sandra Ramsey
N. SANDRA RAMSEY
District Director
Sixth Compensation District
U. S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation
214 North Bogan Street, Suite 1040
Jacksonville, Florida 32209

**_POSTSCRIPT TO SELF-INSURED EMPLOYER/INSURANCE CARRIER:_ Please submit Form LS-208 to indicate payment in accordance with the attached Compensation Order within 16 days of the payment. Failure to do so shall result in a $100.00 penalty per Section 14(g) of the Longshore Act.

APPENDIX D

[SEAL]

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:	CASE NO.: 84-LHC-3178
ALONZO BROWN, Claimant,	OWCP NO.: 6-77155
v.	
SOUTHEASTERN MARITIME COMPANY, Employer,	
and	
GEORGIA INSURERS INSOLVENCY POOL, Carrier.	

Appearances:

Edward T. Brennan, Esq.
For the Carrier

Paul H. Felser, Esq.
For the Claimant

Before: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER ON MOTION FOR RECONSIDERATION

This proceeding arises from a claim filed under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* A hearing in the matter was held on before Judge Aaron Silverman[1] on March 10, 1993.

On January 19, 1994, Judge Silverman issued a Decision and Order wherein he found the Claimant to be entitled to permanent total disability from January 29, 1987.

On February 14, 1994, Carrier timely filed a Motion for Reconsideration, asserting that the Decision should be clarified to provide that annual adjustments under Section 10(f) accrue from the date the Claimant is found to be permanently, totally disabled, and not from the date of the injury. Judge Silverman's decision was silent with regard to annual adjustments.

Claimant responded to Carrier's Motion on May 31, 1994. Claimant argues that Carrier's Motion asks this court to overrule or disregard binding precedent with respect to this claim. Claimant requests the assessment of a reasonable attorney fee for responding to Carrier's Motion.

---

[1] As Judge Silverman is now retired, I am handling the Motion for Reconsideration in this case, pursuant to my order dated April 19, 1994.

DISCUSSION AND CONCLUSIONS

Section 10(f) of the Act provides:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be increased by the lesser of –
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable average weekly wage, as so determined, for the period beginning with the preceding October 1; or
>
> (2) 5 percentum.

33 U.S.C. § 10(f).

In *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), the United States Court of Appeals for the Fifth Circuit held that Section 10(f) cost of living adjustments accrue from the date of injury, rather than from the date of permanent, total disability. An en banc Fifth Circuit overruled *Holliday*, however, in *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990). The court found from the plain and unambiguous words of Section 10(f) that the only cost of living adjustments Section 10(f) provided were for permanent total disability. There are no cost of living adjustments for periods of temporary total disability, or for the Section 10(f) adjustments that accrued during the worker's period of temporary total disability.

This claim falls within the jurisdiction of the Eleventh Circuit. Decisions of the Fifth Circuit, as that court existed on September 30, 1981 and handed down by that court prior to the close of business on that date, are precedent in the Eleventh Circuit unless specifically overruled. Thus, *Holliday* is binding precedent in the Eleventh Circuit, but *Phillips* is not.

In *Hamilton v. Crowder Construction Co.*, 22 BRBS 121 (1989), a case arising within the Eleventh Circuit, the Benefits Review Board held that since *Holliday* was issued prior to September 30, 1981, it was compelled to apply its holding to the payments of permanent total disability benefits. The Eleventh Circuit affirmed this decision in a per curiam opinion, stating that "we must affirm the decision of the Benefits Review Board unless this court, sitting en banc, overrules *Holliday*." *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (emphasis added).

The Board, however, took it upon itself to overrule *Holliday* in the Eleventh Circuit, as well as the Fifth Circuit, in *Stanfield v. Fortis Corp.*, 23 BRBS 230 (1990). In a cursory discussion, the Board stated that although the Eleventh Circuit has not itself addressed the issue of whether Section 10(f) adjustments are applicable to periods of temporary total disability, "since *Holliday* has been overruled by the Fifth Circuit, we believe it would be incongruous to follow it in this case." *Id.* at 232. The Board overstepped its authority in *Stanfield* case: the Eleventh Circuit clearly stated in *Hamilton* that *Holliday* would have to be overruled by an en banc Eleventh Circuit. I therefore find that *Holliday* is still binding precedent in the Eleventh Circuit and that all Section 10(f) cost

of living adjustments in this case accrue from the date of injury.

Attorney Fees

Since Claimant has successfully defended against Carrier's Motion for Reconsideration, Claimant's attorney is entitled to a reasonable and necessary fee to be substantiated by an itemized fee petition. 33 U.S.C. § 928. Such a fee petition must meet the requirements set forth in 20 C.F.R. § 702.132 and must be submitted within 30 days of the date of issuance of this Order. Employer/ Carrier shall then have 30 days following the submission of this fee petition to respond.

ORDER

In light of the above, it is ORDERED that:

1. Carrier's Motion for Reconsideration is DENIED;

2. Carrier shall pay Claimant Section 10(f) cost of living adjustments from the date of injury; and

3. Paul H. Felser, Esq., submit an application for attorney fees pursuant to 20 C.F.R. § 702.132 within thirty (30) days of the issuance of this order. After receipt of such application, Employer will be allowed thirty (30) days in which to submit a reply.

/s/ G. Marvin Bober
G. MARVIN BOBER
Administrative Law Judge

GMB/kad

Dated: AUG. 17, 1994
Washington, D.C.

APPENDIX E

[SEAL]

U.S. Department of Labor
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

Re: Alonzo Brown v. Southeastern Maritime Company, Georgia Insurers Insolvency Pool (Case No. 84-LHCA-3178) (OWCP No. 06-0077155) (BRB No. 94-4002)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 26, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached

please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1995

Sincerely

/s/ Thomas O. Shepherd, Jr./P.F.
Thomas O. Shepherd, Jr.
Clerk of the Board